

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35468

STATE OF IDAHO,)	2009 Unpublished Opinion No. 700
)	
Plaintiff-Respondent,)	Filed: December 1, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STEVE HARMAN,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Order of the district court denying motion for mistrial, affirmed.

Molly J. Huskey, State Appellate Public Defender; Diane M. Walker, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Nicole L. Schafer, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Steve Harman appeals the district court's denial of his motion for mistrial. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Harman was charged with attempted strangulation, Idaho Code § 18-923, during a domestic dispute in Canyon County. During voir dire one of the potential jurors, Juror 239, stated that he worked at the Canyon County Jail and that he knew Harman from supervising people at the jail. The district court later dismissed Juror 239 for cause. Harman moved for a mistrial under Idaho Criminal Rule 29.1, alleging that Juror 239's responses tainted the jury pool. Harman's motion was denied and he ultimately was convicted of attempted strangulation. Harman appeals.

II. ANALYSIS

Harman contends that Juror 239's responses to the Court's questioning implied that Harman was a previous criminal or currently incarcerated, thus tainting the jury pool, infringing on his presumption of innocence, and depriving him of a fair trial.

In criminal cases, motions for mistrial are governed by I.C.R. 29.1. A "mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). Our standard for reviewing a district court's denial of a motion for mistrial is well established:

[T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95, 665 P.3d 1102, 1105 (Ct. App. 1983).

A defendant must demonstrate prejudice when alleging a violation of his presumption of innocence. *State v. Slater*, 136 Idaho 293, 301, 32 P.3d 685, 693 (Ct. App. 2001). As part of the presumption of innocence, a criminal defendant is not compelled to attend trial in prison or jail clothing as it could present a continuing interference with the presumption of innocence. *Id.*; see also *Estelle v. Williams*, 425 U.S. 501, 504, 96 S.Ct. 1691, 1693 (1976) (attaching significance to the clothing as a constant reminder to the jury of the defendant's incarceration). This has been extended to the appearance of defendants at trial in handcuffs or shackles. *Id.* "Many jurisdictions have likewise held or implied that informing the jury that a defendant is in jail is improper because it may raise an inference of guilt." *State v. Harrison*, 136 Idaho 504, 506, 37 P.3d 1, 3, (Ct. App. 2001). While referring to continued custody may be error, it does not present as high of a risk of prejudice as dressing the defendant in prison clothing because it is a single point in time statement rather than a continual reminder of the defendant's presence in custody. *Id.* at 507, 37 P.3d at 4.

A response to voir dire questioning must have a lasting impact for there to be prejudice. *State v. Laymon*, 140 Idaho 768, 771, 101 P.3d 712, 715 (Ct. App. 2004). The purpose of voir dire is to ascertain any knowledge or biases of veniremembers. *Id.* This process generally communicates the potential juror's bias or knowledge to the rest of the jury. This may reflect poorly on the defendant, but removing the potential juror benefits the defendant. In *Laymon*, in response to the trial court's questioning a potential juror stated: "Well, I think he's guilty already. If he's guilty last week, he'll be guilty next week." *Laymon*, 140 Idaho at 713, 101 P.3d at 769. The potential juror was removed, and the trial court issued a curative instruction. *Id.* at 715, 101 P.3d at 771. This Court affirmed the denial of a mistrial because "there was no continuing impact on the trial." *Laymon*, 140 Idaho at 715, 101 P.3d at 771.

It is presumed that the jury obeys the trial court's instructions to disregard statements. *State v. Hedger*, 115 Idaho 598, 601, 768 P.2d 1331, 1334 (1989). This presumption can be overcome with a showing that there is an "overwhelming probability" the jury cannot follow the instruction and the evidence is "devastating" to the defendant. *State v. Hill*, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004) (citing *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)). In *Hill*, the prosecutor referred to the defendant's custody in jail while questioning a witness. The defendant objected. The trial court sustained the objection, denied the motion for a mistrial, and directed the jury to disregard the statement. This Court stated:

[T]he prosecutor's disclosure to the jury that [the defendant] had been in jail could hardly be characterized as "devastating." Given that [the defendant] was on trial for a criminal offense, even in the absence of the prosecutor's question, any reasonably knowledgeable juror likely would have surmised that [the defendant] had at some point been in jail.

Hill, 140 Idaho at 631, 97 P.3d at 1020. Thus, the denial of the mistrial was affirmed. *Id.*

The voir dire responses that are the concern of this appeal arose during the district court's questioning of the venire.

The Court: ... Do any of you know Mr. Harman or are you acquainted with him or any member of his family, as far as you know? Number 239?

Juror #239: Yes, ma'am.

The Court: And you --

Juror #239: I am a sergeant at the Canyon County Jail, and so I supervise people there.

The Court: Okay. Well, so you just have met him in a professional capacity?

Juror #239: Yes, ma'am.

The Court: In the past?
Juror #239: Yes, ma'am.

Thereafter, the district court asked if anyone had an employee or employer relationship with any of the parties, including Canyon County. Juror 239 answered affirmatively. The district court held a bench conference and dismissed Juror 239 because of the employment relationship.

During a recess in the prosecution's questioning of the venire, Harman made a motion for a mistrial based on Juror 239's responses quoted above. The district court indicated that it was hesitant to grant the motion but reserved ruling. Harman was offered a curative instruction, which he declined. Over the course of the trial, Harman's counsel referred to his arrest, two pictures were admitted showing Harman in handcuffs, and two officers testified to arresting Harman. The district court revisited the motion for a mistrial after the jury returned a guilty verdict and denied the motion on the grounds that: (1) while not dispositive, Harman delayed in making the motion;¹ (2) Harman made his own references to the arrest; (3) there was nothing to suggest that Harman was in custody other than when arrested; and (4) ultimately Harman received a fair trial.

Harman argues he was entitled to a mistrial because Juror 239's answers during voir dire implied Harman had past difficulties with the law or was currently incarcerated. He asserts that this frustrated his efforts, including wearing street clothes, to avoid the appearance of being in custody at the time of trial. Harman claims Juror 239's answers impermissibly tainted the jury in the same manner as forcing Harman to attend trial in jail attire and violated the district court's pretrial order barring reference to Harman's prior arrests for assault.²

In this case, Harman has not demonstrated prejudice. Juror 239 did not sit on the jury, having been dismissed for cause. Juror 239's statement of knowing Harman in his capacity as a supervisor at the jail was ambiguous relative to the circumstance of the past interaction, including whether Harman was in jail once upon arrest or continually leading up to trial.

¹ The State concedes the motion for a mistrial was timely.

² Harman also argues that the prosecutor should have been aware Juror 239 was a Canyon County jailer and presumably taken some action to prevent the statement. Harman does not allege the prosecutor actually knew that Juror 239 was a jailer or cite authority establishing a prosecutor's duty to become aware or take any steps if he was aware of such fact. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Harman has not shown a continual impact at trial or a “devastating” effect necessary to establish prejudice, and considering the other references to his arrest made by his own counsel at trial, he cannot. Thus, “any reasonably knowledgeable juror likely would have surmised that he had at some point been in jail.” *Hill*, 140 Idaho at 631, 97 P.3d at 1020. Although it is understandable that Harman did not wish to highlight the issue, Harman declined a curative instruction, which it is presumed a jury would follow, ameliorating the prejudicial effect, if any, of Juror 239’s statements. The district court did not err in denying the motion for mistrial.

III.

CONCLUSION

Harman failed to demonstrate prejudice from Juror 239’s answers and, therefore, the district court’s denial of Harman’s motion for mistrial is affirmed.

Chief Judge LANSING and Judge MELANSON, **CONCUR.**